Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH WILLIAMS, Superintendent,
Fulton Correctional Facility,

Petitioner,

—against—

PETER VIDAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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27 pp

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erroneously construed the Public Trial Clause of the Sixth Amendment by ruling that a state court could not exclude the defendant's father and step-mother from the portion of his trial in which an undercover police officer testified that defendant had sold him narcotics upon a showing: (1) that the police officer continued to purchase narcotics in the same area where he purchased narcotics from the defendant; (2) that undercover officers have been threatened, harmed and even killed by drug dealers after their identities have been divulged in open court; (3) that defendant's father and step-mother resided near areas frequented by drug dealers; and (4) that excluded members of defendant's family could be expected to seek vengeance against the undercover officer in the event that the defendant was convicted upon the basis of the officer's testimony?

2. Whether the United States Court of Appeals for the Second Circuit erroneously applied this Court's holding in *Waller v. Georgia*, 467 U.S. 39 (1984) by placing the burden to provide alternatives to closure upon the trial court rather than on the party opposing closure?

3. Whether the "overriding interest" mandated by *Waller v. Georgia*, 467 U.S. 39, 45 (1984) to justify the complete closure of a pretrial hearing to the public should apply to the limited closure of a trial for the testimony of a single witness?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
The Facts	2
The Judgment	3
The State Court Appeal	4
The Rulings on Habeas Corpus	4
The Decision of the Court of Appeals	4
REASONS FOR GRANTING THE WRIT	5
This Court has never decided what circumstances justify the closure of a courtroom for the testimony of a single witness and the decision below that the prosecution must demonstrate that the persons to be removed "were inclined to harm" the undercover police officer creates a split among the circuits regarding the appropriate standard for closing the courtroom.	5
CONCLUSION	9
APPENDIX A	A1

TABLE OF AUTHORITIES

Cases:	PAGE
Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975)	8
Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984) .	7, 8
Gannett Co. v. DePasquale, 443 U.S. 368 (1978)	8
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	6
Nieto v. Sullivan, 879 F.2d 743 (10th Cir. 1989)	6, 8
People v. Hinton, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972), *cert. denied*, 410 U.S. 911 (1973)	7
People v. Vidal, 78 N.Y.2d 927, 573 N.Y.S.2d 480, 577 N.E.2d 1072 (1991)	4
People v. Vidal, 172 A.D.2d 228, 567 N.Y.S.2d 727 (1st Dept. 1991).....	4, 7
United States v. Galloway, 963 F.2d 1388 (10th Cir. 1992)	8
United States v. De Los Santos, 810 F.2d 1226 (5th Cir. 1987)	6
United States v. Lucas, 932 F.2d 1210 (8th Cir. 1991)..	6
United States v. Peters, 754 F.2d 753 (7th Cir. 1985) .	8
United States v. Raffoul, 826 F.2d 218 (3d Cir. 1987).	8
United States v. Sherlock, 962 F.2d 1349 (9th Cir. 1989)	6, 8
Vidal v. Williams, ___ F.2d ___ (2d Cir. 1994)	1
Vidal v. Williams, ___ F. Supp. ___ (S.D.N.Y. 1993)..	1

PAGE

Waller v. Georgia, 467 U.S. 39 (1984) ..... *passim*

Woods v. Kuhlman, 977 F.2d 74 (2d Cir. 1992) 6, 8

Statutes:

28 U.S.C. § 1254(1) 2

New York Penal Law §§ 220.39(1), 220.16(1) 3

Constitutional Provisions:

United States Constitution, Sixth Amendment 2

United States Constitution, Fourteenth Amendment .. 2

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No. _____

JOSEPH WILLIAMS, Superintendent,
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PETER VIDAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 29, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals, *Vidal v. Williams*, ____ F.2d ____ (2d Cir. 1994) and the opinion of the District Court for the Southern District of New York, *Vidal v. Williams*, ____ F. Supp. ____ (S.D.N.Y. 1993) (Preska, J.), are appended hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on July 29, 1994. The petition for certiorari is filed within ninety days of the date of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The Facts

At defendant's trial for sale of narcotics, the State moved to close the courtroom to the public, including defendant's father and step-mother, solely for the testimony of the undercover police officer to whom defendant had sold drugs, upon the representations: (1) that the undercover officer continued to purchase narcotics in the area of 866 Union Ave on a regular basis; (2) that his life would be in danger after his identity was revealed to members of the public in open court; (3) that, although the undercover officer had not yet received threats because his identity was still a secret, he feared for his life if his identity became publicly known because other undercover officers had been harmed after their identities were divulged in open court; (4) that, although defendant's family appeared

to be decent people, they lived less than three miles away from the scene of the drug sale, and could be expected to "take out their frustrations, their anger" upon the undercover officer in the event that defendant was convicted. Defense counsel agreed that the general public could be excluded upon the basis provided, but objected solely to the exclusion of defendant's parents (T. 118-19, 123-24, 127).[1]

The state trial court decided to close the courtroom to all spectators "in order to protect the Officer's life because there have been recent incidents where undercover officers have been shot at and even wounded" (T. 129). It found:

> the officer has a present fear for his life and safety, that he's presently engaged in similar activities which is undercover work and that he's engaged in the Bronx in a particular location where this incident occurred, and I assume throughout the entire Bronx. This unit is a Bronx-wide unit, and yet the parents live on Gerard Avenue, there are areas not far from this courthouse that are known as high drug areas and its conceivable and entirely possible that the Officer may be recognized by them while he's involved in another undercover operation, and if the defendant is convicted as [the prosecutor] stated, they may not have fondness for the officer. (T. 129).

The Judgment

On February 10, 1989, respondent was convicted, following a jury trial of Criminal Sale of a Controlled Substance in the Third Degree and Criminal Possession of a Controlled Substance [New York Penal Law §§ 220. 39(1), 220.16(1)], and sentenced to two concurrent indeterminate terms of imprisonment of from five to ten years.

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[1] Numerical references preceded by "T." refer to the pages of the trial transcript.

The State Court Appeal

Respondent appealed to the Supreme Court of the State of New York, Appellate Division, First Department, arguing that his Sixth Amendment right to a public trial was violated when the courtroom was closed to the public in general and to his parents in particular. On April 9, 1991 the Appellate Division affirmed, holding that defendant had not preserved his claim regarding the closure of the courtroom to the general public and that the exclusion of defendant's parents did not violate the rule of *Waller v. Georgia*, 467 U.S. 39 (1984). *People v. Vidal*, 172 A.D.2d 228, 567 N.Y.S.2d 727 (1st Dept. 1991). On June 27, 1991, leave to appeal to the New York State Court of Appeals was denied. *People v. Vidal*, 78 N.Y.2d 927, 573 N.Y.S.2d 480, 577 N.E.2d 1072 (1991) (Wachtler, C.J.).

The Rulings on Habeas Corpus

On July 20, 1993, the United States District Court for the Southern District of New York (Preska, J.), found that the Public Trial Clause had not been violated by the closure of the courtroom, reasoning that, for purposes of the *Waller* criteria: (1) the safety of the undercover officer constituted an overriding interest likely to be prejudiced; (2) the closure for the testimony of a single witness was no broader than necessary; (3) the state court considered the one alternative posed to it by defense counsel, to exclude the public but allow the defendant's parents to remain; and (4) the trial court made "substantive findings regarding the closure of the courtroom" (Appendix pp. A10-A12).

The Decision of the Court of Appeals

On July 29, 1994, the Second Circuit reversed and remanded the case with instructions to grant the writ. It reasoned that there was insufficient showing that defendant's parents were inclined to harm the undercover officer, and there was little chance that they would have encountered the

officer while he was working. It believed that the State was seeking a rule that would justify closure upon a showing only that the relatives lived or worked in the county in which the undercover officer operated. Finally, it concluded that the State court gave no consideration to less restrictive alternatives, such as screening devices to conceal the witness's identity (Appendix pp. A2-A7).

REASONS FOR GRANTING THE WRIT

THIS COURT HAS NEVER DECIDED WHAT CIRCUMSTANCES JUSTIFY THE CLOSURE OF A COURTROOM FOR THE TESTIMONY OF A SINGLE WITNESS AND THE DECISION BELOW THAT THE PROSECUTION MUST DEMONSTRATE THAT THE PERSONS TO BE REMOVED "WERE INCLINED TO HARM" THE UNDERCOVER POLICE OFFICER CREATES A SPLIT AMONG THE CIRCUITS REGARDING THE APPROPRIATE STANDARD FOR CLOSING THE COURTROOM.

This case presents the opportunity to consider the application of the Public Trial Clause of the Sixth Amendment in a context that this Court has not addressed to date, that is whether society's need to protect the safety of undercover police officers, who continue to perform this most dangerous of assignments following the trial at issue, should override the desire of the defendant to have his family present in court for his trial. Given the breadth of the nation-wide drug problem, one can safely state that trial courts in every state and the judges in every federal district confront this question numerous times every year. This case also presents the opportunity for this Court to define what showing is required to justify the exclusion of the public at trial for the testimony of a single witness and to decide who should bear the burden of putting forward alternatives to closure. The circuit courts of appeal

and the highest courts of the states have not articulated a consistent rationale in deciding these recurring questions.

Here, while purportedly relying on the test of *Waller v. Georgia*, 467 U.S. 39 (1984) which justifies total closure of the courtroom during a pre-trial hearing, the court below found the closure of the courtroom to defendant's parents at trial invalid, because "there was no evidence that [defendant's] parents were inclined to harm a police officer" (Appendix p. A5).

By requiring a showing that those removed were "inclined to harm" the officer, this panel of the Second Circuit stands alone. Safeguarding the physical and psychological well-being of a witness is a compelling state interest which may justify total closure, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982), but research reveals no case which requires a demonstration that courtroom spectators will be inclined to harm the witness before that "overriding interest [is] likely to be prejudiced." *Waller v. Georgia*, 467 U.S. at 48.

Federal circuit courts consistently have excluded persons from the courtroom without a showing that those excluded were inclined to threaten the witness. *See, e.g., Woods v. Kuhlman*, 977 F.2d 74, 77 (2d Cir. 1992) (exclusion of family members, who had never threatened testifying witness in addition to the family member who made a threat, not overbroad); *United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1991) (actual threats against an undercover officer are relevant to the issue of impending harm to the undercover officer but not dispositive); *Nieto v. Sullivan*, 879 F.2d 743, 751, 753 (10th Cir. 1989) (defendant's relatives excluded, absent evidence of actual threats, because witness was frightened); *United States v. Sherlock*, 962 F.2d 1349, 1357 (9th Cir. 1989) (defendant's family excluded for making faces at witness); *United States v. De Los Santos*, 810 F.2d 1226, 1334 (5th Cir. 1987) (confidential informant, entire public and defendant

excluded despite absence of specific threats); *Douglas v. Wainwright*, 739 F.2d 531, 532-33 (11th Cir. 1984) (exclusion of general public but not press and defendant's family justified by need to protect witness).[2] New York courts also approve of closure in order to protect the well-being of witnesses. *See, e.g., People v. Hinton*, 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972), *cert. denied*, 410 U.S. 911 (1973). Therefore it is not surprising that the Second Circuit did not cite any authority when it established the "inclined to harm" rule (Appendix p. A5).

Here, the threat to the witness's well-being is implicit and justifies the exclusion of those who would have a motive to harm him if the defendant were convicted. The officer stated that he continued to work undercover in the vicinity where he arrested defendant and the threat to his safety if he were seen in open court was acknowledged by the court and the parties. Defendant's parents lived less than three miles away from that location in close proximity to a high drug area. Thus, a word passed to a drug-dealer near their residence, or to those who worked with defendant at the arrest location, could jeopardize the officer. Accordingly, the closure was "no broader than necessary to protect" the compelling interest of the officer's safety. *Waller v. Georgia*, 467 U.S. at 48.

The decision below also creates a conflict between the circuits as to where the burden of providing alternatives to closure should be placed. Here, the District Court found that the trial court complied with *Waller* when it considered and rejected the only alternative offered by the party opposing closure, that, while the general public could be excluded, the

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[2] Although *Sherlock*, *Nieto*, *Douglas* and *Woods* considered partial closure of the courtroom, which many federal courts have stated operates under the less stringent standard of "substantial reason" rather than an "overriding interest," they are nonetheless relevant to this case because defense counsel conceded, "we're not asking for a general opening," and limited his objections to the exclusion of defendant's parents. *People v. Vidal*, 172 A.D.2d at 229.

defendant's parents should remain (Appendix p. A11). The circuit court reversed, however, finding "that the trial court gave no consideration to less restrictive alternatives such as screening devices to conceal the witness's identity" (Appendix p. A7). The view that the trial court has the burden to consider alternatives *sua sponte* is shared by the Seventh Circuit. *United States v. Peters*, 754 F.2d 753, 761 (7th Cir. 1985). The Third Circuit disagrees, however, and holds that those who object to closure have the responsibility of showing, to the court's satisfaction, that alternative procedures are available that would eliminate the dangers shown by the defendant and/or the state. *United States v. Raffoul*, 826 F.2d 218, 220 (3d Cir. 1987). Justice Powell shared this view as well. *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1978) (Powell, J., concurring).

Finally, this Court has never decided whether *Waller's* "overriding interest" requirement to justify the complete closure of a pre-trial proceeding should apply to closure of a limited portion of a trial. *Waller* 467 U.S. at 48. When it promulgated the "overriding interest" standard, this Court was addressing the closure of the entire proceeding. Here, only one witness's testimony was closed to the public and the majority of the trial was open to all who wished to attend. Since only a small and limited portion of the trial was closed, the secrecy and fairness concerns implicated in a proceeding entirely closed to the public are lessened. Accordingly a "substantial reason" rather than an "overriding interest" should be sufficient to justify the closure. Indeed, many circuit courts have specifically distinguished *Waller*, and for the same reasons have adopted that test when the courtroom was subjected to a partial closure. *See, e.g., United States v. Galloway*, 963 F.2d 1388, 1390 (10th Cir. 1992); *Woods v. Kuhlman*, 977 F.2d at 76; *United States v. Sherlock*, 962 F.2d at 1357; *Nieto v. Sullivan*, 879 F.2d at 753-4; *Douglas v. Wainwright*, 739 F.2d at 533; *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975). Because the majority of closure cases will only involve the

closure of a part of a proceeding, it is imperative that this Court address the issue that was left undecided by *Waller*.

This Court has never addressed any of these questions in the context of the exclusion of the defendant's family for the testimony of a single undercover police officer at trial. The war against narcotics continues to be a major focus of the nation-wide law enforcement community, and these questions will recur. Many lives of undercover police officers may depend on this Court's determination as to how to the *Waller* test is to be applied in these circumstances. This Court should grant this petition to answer these recurring questions and to resolve the conflicts in rationale articulated by the courts below.

CONCLUSION

FOR THE FOREGOING REASON, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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October 1994

APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1750—August Term, 1993

Argued: June 2, 1994 Decided: July 29, 1994

Docket No. 93-2548

PETER VIDAL,

Petitioner-Appellant,

—against—

JOSEPH WILLIAMS, Superintendent of
Fulton Correctional Facility,

Respondent-Appellee.

Before:

NEWMAN, *Chief Judge*,
LUMBARD and OAKES, *Circuit Judges*.

Appeal from a judgment of the District Court for the Southern District of New York (Preska, *J.*), dismissing petition for a writ of habeas corpus on the ground that

petitioner's Sixth Amendment right to a public trial was not violated when his criminal trial in state court was closed to the public—including petitioner's parents—during the testimony of an undercover witness.

Reversed and remanded.

DIANE E. COURSELLE, Staff Attorney, New York, New York (Office of the Appellate Defender, New York, New York, Ira Mickenberg, Attorney for Petitioner, Joseph M. Nursey, Supervising Attorney, New York, New York, of counsel), *for Petitioner-Appellant.*

ALAN S. RAFTERMAN, Assistant District Attorney, Bronx, New York (Robert T. Johnson, District Attorney, Bronx County, Allen H. Saperstein, Assistant District Attorney, Bronx, New York, of counsel), *for Respondent-Appellee.*

LUMBARD, *Circuit Judge*:

Peter Vidal appeals from a judgment of the District Court for the Southern District of New York, Preska, *J.*, dismissing his petition for a writ of habeas corpus. The district court held that Vidal's Sixth Amendment right to a public trial was not violated when his criminal trial in the New York Supreme Court, Bronx County, was closed

to the public—including Vidal's parents—during the testimony of an undercover police officer. As we conclude that the exclusion of Vidal's parents was improper, we reverse and remand.

I.

The trial testimony showed the following. On January 5, 1988, undercover police officer Irvin Noak, police officer James O'Connell, and a backup team conducted a "buy and bust" operation at a small grocery store at 866 Union Avenue in the Bronx. Noak entered the store and offered to purchase crack cocaine from Vidal who was working behind the counter. Vidal offered to sell a $20 vial of crack, which Noak purchased with pre-recorded buy money. Noak then left the store and radioed Vidal's description to O'Connell, who was waiting a few blocks away. O'Connell and the backup unit arrested Vidal and three other individuals, and seized twenty-nine vials of crack cocaine and $10 of the prerecorded buy money. Noak then drove by the front of the store and identified Vidal as the seller.

Vidal was charged with sale of a controlled substance, possession with intent to sell a controlled substance, and possession of a controlled substance. At trial, the state called Officers O'Connell and Noak. Prior to Noak's testimony, the prosecution made an application to close the courtroom during Noak's testimony in order to protect his identity as an undercover officer.

At an in camera hearing, Noak testified that he was still working undercover in an anti-crack unit that operated in the vicinity of 866 Union Avenue. He feared that his life would be in danger if his identity became known, as other

undercover officers had been threatened or harmed after their identities had been disclosed.

Defense counsel requested that Vidal's parents, who were present at trial, be allowed to remain in the courtroom during Noak's testimony. Vidal's parents lived near the courthouse on Gerard Avenue, and to counsel's knowledge they did not frequent the vicinity of 866 Union Avenue.

The court granted the prosecution's application and closed the courtroom during Noak's testimony. The court found that Noak feared for his life and safety, that Noak was still involved in undercover activities in the same area, and that other undercover officers had been threatened and even wounded. The court closed the courtroom to Vidal's parents because Noak worked in a Bronx-wide unit, there were many high-drug areas near the courthouse, and "it's conceivable and entirely possible that the officer may be recognized by them while he's involved in another undercover operation, and if the defendant is convicted, . . . [his parents] may not have a fondness for the officer."

Vidal was convicted of one count of possession of a controlled substance and one count of sale of a controlled substance, and was sentenced to two concurrent prison terms of five to fifteen years. The Appellate Division affirmed the conviction, *People v. Vidal*, 172 A.D.2d 228, 567 N.Y.S.2d 727 (1st Dept. 1991), and the Court of Appeals denied leave to appeal, *People v. Vidal*, 78 N.Y.2d 927, 577 N.E.2d 1072, 573 N.Y.S.2d 480 (1991).

On January 11, 1993, Vidal filed a petition for a writ of habeas corpus in the Southern District, claiming that the state had violated his Sixth Amendment right to a public trial. On July 20, 1993, the court denied the application

without a hearing, finding that the closure was justified under the circumstances. Vidal appeals, arguing that the trial court was required to keep the courtroom open to the general public, or at least to his parents.

II.

A criminal defendant's Sixth Amendment right to a public trial "may give way in certain cases to other rights or interests." *Waller v. Georgia*, 467 U.S. 39, 45 (1984). A court may close a criminal trial over the defendant's objection if the following requirements are met:

> [1] the party seeking to close the [trial] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Id. at 48. At issue is whether the exclusion of Vidal's parents was "necessary to protect" the state's interest in assuring Noak's safety.[1] We conclude that it was not.

The state argues that it was necessary to exclude Vidal's parents to prevent them from recognizing Noak during an undercover operation and disclosing his identity as retribution for their son's conviction. We disagree. There was no evidence that Vidal's parents were inclined to harm a police officer. In fact, the prosecutor stated that to the best of his knowledge Vidal's parents were "very decent individuals."

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[1] Vidal also contests the exclusion of the general public. Because we reverse on the ground that the exclusion of his parents was improper, we do not decide that issue.

More importantly, there was little chance that Vidal's parents would have encountered Noak during an undercover operation. The trial court found that an encounter was likely because Vidal's parents lived in the Bronx and Noak's unit operated throughout the Bronx. However, the Bronx covers 41 square miles and has 1.2 million residents. *See People v. Martinez*, 82 N.Y.2d 436, 443, 624 N.E.2d 1027, 1031, 604 N.Y.S.2d 932, 936 (1993). A chance meeting somewhere in the Bronx was unlikely. The exclusion was not justified.

The state argues that two facts made an encounter likely. First, Gerard Avenue, where Vidal's parents lived, is in the vicinity of 866 Union Avenue, where the arrest occurred and where Noak still worked undercover. In support of this argument, the state asks us to take judicial notice that the two locations are less than three miles apart. The argument is not persuasive. In New York City, two locations three miles apart are hardly in the same vicinity. Almost seventy percent of the Bronx (and 830,000 people) could fit within three miles of 866 Union Avenue.

Second, the state argues that an encounter would be likely because the parents lived in a "high drug area." Again, we are not persuaded. Despite the state's assertions, the trial judge did not find that Vidal's parents lived in a high drug area. The trial judge merely noted that the parents lived on Gerard Avenue (which is near the courthouse), and that "there are areas not far from the courthouse that are known as high drug areas." Thus, the record only indicates that Vidal's parents lived *near* a high drug area. Given the scope of the drug problem in the Bronx, there is minimal risk that two people who happen to live near a high drug area will have a chance meet-

ing with a specific undercover officer working throughout the borough.

In sum, the state is asking this court to hold that a courtroom can be closed to a defendant's relatives as long as the relatives live (or, presumably, work) in the county where the undercover officer operates. Such a holding would violate the rule that closure is reserved for rare circumstances in which "the balance of interests [are] struck with special care." *Waller*, 467 U.S. at 45. Moreover, the Supreme Court has specifically noted a special concern for assuring the attendance of family members of the accused. *See In re Oliver*, 333 U.S. 257, 271-72 & n.29 (1948). Finally, we observe that the trial court gave no consideration to less restrictive alternatives such as screening devices to conceal the witness's identity. *See United States v. Lucas*, 932 F.2d 1210, 1216-17 (8th Cir.), *cert. denied*, 112 S. Ct. 399 (1991).

As the petitioner need not show prejudice, *Waller*, 467 U.S. at 49-50, we reverse the district court's denial of the writ of habeas corpus, and remand for entry of an order granting the petitioner's release unless the state affords him a new trial within a reasonable time.

Reversed and remanded.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 775 (LAP)

Filed: July 22, 1993

PETER VIDAL,

Petitioner,

—against—

JOSEPH WILLIAMS, Superintendent
Fulton Correctional Facility,

Respondent.

OPINION AND ORDER

LORETTA A. PRESKA, U.S.D.J.:

This is a habeas corpus petition by a state prisoner. The issue before the Court is quite narrow and concerns the constitutionality of the closure of the trial courtroom during the testimony of an undercover officer.

Proceedings at Trial[1]

The relevant trial proceedings occurred as follows. The assistant district attorney, Mr. Batala, made an application to have the courtroom closed during the testimony of the undercover officer, Officer Noak. Judge Silverman, the presiding

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[1] These proceedings are reported at pages 118-130 of the transcript of the trial.

judge, immediately inquired as to the basis for the request, and Mr. Batala responded that Officer Noak worked on a regular basis in the vicinity of 866 Union Avenue, the location of the undercover operation at issue in the case, and that Officer Noak would be in danger if his identity were to become known. At this time, Judge Silverman conducted a brief *in camera* hearing during which counsel were allowed to examine Officer Noak.

During the examination, Officer Noak stated that he was an undercover officer, that he operated in the Bronx including the vicinity of 866 Union Avenue, and that disclosure of his identity as an undercover officer would endanger him although he had not received any threats in connection with this case. Notably, Judge Silverman himself examined Officer Noak after Mr. Batala and petitioner's counsel, Mr. Zizmor, each had an opportunity to examine him. In response to Judge Silverman's questions, Officer Noak stated that he had never received any threats against himself but knew of other undercover officers who had been threatened or harmed when their identity became known.

In response to further questions by counsel, Officer Noak stated that he did not know petitioner's parents but that he had been in the vicinity of 866 Union Avenue on several occasions since petitioner's arrest, most recently three or four weeks prior to the examination.

At this time, Officer Noak was excused, and Mr. Zizmor requested that petitioner's parents, who had been watching the trial, be allowed to remain in the courtroom during Officer Noak's testimony. In response to Judge Silverman's inquiry, Mr. Zizmor stated that the parents lived in the Bronx at 1075 Gerard Avenue and, to Mr. Zizmor's knowledge, did not work in or frequent the vicinity of 866 Union Avenue. Mr. Batala then contended that the parents, if petitioner were convicted, might take out their frustrations, their anger upon seeing Officer Noak whether it be in the vicinity of 866 or . . . anywhere else in the Bronx."

Thereafter, Judge Silverman granted Mr. Batala's application to close the courtroom and elaborated upon the basis of

his ruling, including, *inter alia*, Officer Noak's fear for safety, Officer Noak's continuing undercover work in the Bronx, and the potential that the parents might see and recognize Officer Noak while he was working on another undercover operation.

Waller v. Georgia

Petitioner argues that Judge Silverman's closure of the courtroom violated his Sixth Amendment right to a public trial. The Supreme Court recently articulated the applicable standard in *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984). Pursuant to *Waller*, the Court conducts a four-point test as to the closure of the courtroom. Applying this test, the Court finds that closure of the courtroom was justified in this case.

(1) *Overriding Interest.* Under the first prong of *Waller*, the party seeking closure of the courtroom must advance an overriding interest that is likely to be prejudiced. Here, that overriding interest was obviously the safety of Officer Noak. Importantly, that interest was developed under the particular circumstances of this case. *See Ip v. Henderson*, 710 F. Supp. 915, 918 (S.D.N.Y.), *aff'd mem.*, 888 F.2d 1376 (2d Cir. 1989); *Jones v. Henderson*, 683 F. Supp. 917, 923 (E.D.N.Y. 1988).

Here, Judge Silverman himself elicited from Officer Noak his knowledge of other undercover officers who were threatened or harmed when their identity became known. In addition, Judge Silverman had before him evidence of Officer Noak's repeated visits to the vicinity of 866 Union Avenue. Also of note, Judge Silverman himself asked Mr. Zizmor where petitioner's parents lived. In making his ruling, Judge Silverman appears to have considered these very specific facts in conjunction with his own knowledge of the geography of the Bronx. Accordingly, sufficient evidence was presented regarding the danger to Officer Noak under the particular circumstances of this case so that Judge Silverman cannot be viewed to have adopted a *per se* rule of closure for instances where an undercover officer testifies. *See id.*

(2) *Breadth of Closure.* The second prong of the *Waller* test requires that closure be no broader than necessary to protect the overriding interest urged by the moving party in the first prong. Under the circumstances of this case, this injury begs the propriety of the exclusion of petitioner's parents.

Mr. Zizmor expressly urged Judge Silverman to allow petitioner's parents to remain in the courtroom during Officer Noak's testimony. Thus, Judge Silverman very clearly had the issue before him of the propriety of excluding *all* spectators from the courtroom versus allowing certain spectators to remain. In his ruling, Judge Silverman explicitly found that the presence of the parents in the courtroom posed a danger to Officer Noak. In this manner, I find that Judge Silverman considered the appropriate breadth of the closure.

In addition, the closure at issue in this case concerned only the part of the trial during which Officer Noak testified. In this manner, too, the closure at issue was no broader than necessary to protect Officer Noak.

(3) *Reasonable Alternatives.* The third prong of the *Waller* test requires the trial court to consider reasonable alternatives to closing the proceedings. Here, Judge Silverman considered the feasibility of partial closure of the proceedings but found that all spectators, including petitioner's parents, should be excluded. No other alternative to the closure of the courtroom was presented by Mr. Zizmor, and the only other alternative presented by petitioner at this time is for Judge Silverman to have had Officer Noak testify from behind a screen. Such *post hoc* submission of alternatives to closure cannot invalidate a trial court's consideration of alternatives presented at the time the motion for closure is made.

(4) *Findings.*

Finally, the trial court must make findings adequate to support the closure. As reviewed above, Judge Silverman made substantive findings regarding the closure of the courtroom. Moreover, Judge Silverman appears to have taken a very active role in the conduct of the examination of Officer Noak and to have made every effort to obtain all information rele-

vant to the closure from Officer Noak and counsel. In this manner, Judge Silverman's conduct meets the requirements and embraces the spirit of *Waller*.

Conclusion

For the reasons state above, the writ is denied, and the Clerk of the Court is directed to enter judgment dismissing the petition with prejudice. As the petition presents no question of substance for appellate review, a certificate of probable cause will not issue, 28 U.S.C. § 2253, and I certify pursuant to 28 U.S.C. § 1915(a) that any appeal from this order would not be taken in good faith.

The Clerk of the Court is directed to forward a copy of this Opinion and Order to counsel for the parties.

It is so Ordered.

Dated: New York, New York
July 20, 1993

/s/ LORETTA A. PRESKA
Loretta A. Preska, U.S.D.J

Supreme Court, U.S.
FILED
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No. 94-799

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH WILLIAMS, Superintendent,
Fulton Correctional Facility,
Petitioner,

v.

PETER VIDAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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November 1994

14 pp

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit correctly determined that the exclusion of Peter Vidal's parents from the courtroom during the testimony of a key witness was a violation of his right to a public trial, in the absence of any evidence that they posed a threat to the witness?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
The Trial	2
The State Court Appeal	4
The Ruling on Habeas Corpus	4
The Decision of the Court of Appeals	4
REASONS WHY THE PETITION SHOULD BE DENIED	6
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY DETERMINED THAT, IN THE ABSENCE OF ANY EVIDENCE THAT THEY POSED A THREAT TO THE WITNESS, THE EXCLUSION OF PETER VIDAL'S PARENTS FROM THE COURTROOM DURING THE TESTIMONY OF A KEY WITNESS WAS A VIOLATION OF HIS RIGHT TO A PUBLIC TRIAL	6
CONCLUSION	9

TABLE OF AUTHORITIES

Statutes

N.Y. Penal Law § 220.16(1) 4

N.Y. Penal Law § 220.39(1) 4

Cases

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613 (1982) 6-8

In re Oliver, 333 U.S. 257 (1948) 7

People v. Martinez, 82 N.Y.2d 436, 604 N.Y.S.2d 932 (1993) ... 7

Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819 (1984) 6,8

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 596, 102 S. Ct. 2814 (1980) 6

Vidal v. Williams, 31 F.3d 67 (2d Cir. 1994) 1

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210 (1984) 6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Peter Vidal respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 31 F.3d 67 (1994).

STATEMENT OF THE CASE

The Trial

This was a routine $20 street level drug sale case. On January 5, 1988, while working in a corner store, Peter Vidal allegedly sold a single vial of cocaine to an undercover officer. T. 137-38.[1] The officer was involved in a "buy and bust operation" which is no more than the officer's one time attempt to buy a single dose of drugs from a person who looks like he or she might be selling. If the undercover officer successfully makes a buy, he radios a description of the suspect to nearby backup officers, who then come in and, usually within minutes, make an arrest. What is not involved in a buy and bust operation is any long term investigation of any person or persons suspected of selling drugs. The State's only witnesses at trial were the undercover officer who allegedly made the buy and the arresting officer.

During trial, the State moved to have all spectators, including Peter Vidal's parents, excluded from the courtroom during the undercover officer's testimony. T. 118-19, 126-28. Defense counsel specifically objected to the exclusion of Peter Vidal's family. T. 125-130.[2] The officer's testimony at the

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1. References to the trial transcript, the State's Petition for Certiorari, and the Appendix will be cited as "T.", "P.", and "A.", respectively.

2. The State's representation that "[d]efense counsel agreed that the general public could be excluded upon the basis provided," P. 3, misconstrues the record. Although defense counsel offered the reasonable alternative that, at the very least, Peter Vidal's parents should be able to attend, he never conceded that the State had demomstrated an adequate basis for excluding anyone from the courtroom.

brief in camera hearing, represented nothing more than that, like every other undercover officer, he feared having his identity exposed. T. 121-22.

The State's assertion that the officer "feared for his life if his identity became publicly known because other undercover officers had been harmed after their identities were divulged in open court," P. 2, is unsupported by the record. While he testified that more than one unspecified officer, involved in unspecified types of undercover activity, had been threatened when their identities became known, T. 123, there was no evidence that their identities had been revealed as a result of testifying in open court. This officer, however, who had been working undercover for two years, T. 120, had never been threatened in this or any other case, T. 122-23.

As for Peter Vidal's parents, the prosecutor was "sure they're very decent individuals." T. 126. They lived about three miles from the scene of their son's arrest. T. 125-26. The officer did not know them nor had he ever been threatened by them. T. 124.

The state trial court locked Peter Vidal's parents, and all other spectators, from the courtroom during the officer's testimony. T. 128-30. The court's decision was based on the speculation that because the officer worked for what it assumed was a "Bronx-wide unit", and because Peter Vidal's parents lived in the Bronx, "its conceivable and entirely possible that the Officer may be recognized by them while he's involved in another undercover operation, and if the defendant is convicted . . .

they may not have a fondness for the officer." T. 129 (emphasis added).

On February 10, 1989, Peter Vidal was convicted of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, see N.Y. Penal Law § 220.39(1), 220.16(1), and sentenced to two concurrent terms of five to ten years imprisonment.

The State Court Appeal

On April 9, 1991, the Supreme Court of the State of New York, Appellate Division, First Department affirmed Mr. Vidal's conviction. On June 27, 1991, leave to appeal to the New York State Court of Appeals was denied.

The Ruling on Habeas Corpus

On July 20, 1993, the United States District Court for the Southern District of New York denied Mr. Vidal's petition for writ of habeas corpus. A. 10-12.

The Decision of the Court of Appeals

On July 29, 1994, the Second Circuit reversed and remanded with instructions to grant the writ. A. 2-7. The court reasoned that, under the particular facts of this case, it is simply inconsistent with the Sixth Amendment to "hold that a courtroom can be closed to a defendant's relatives as long as the relatives live (or, presumably work) in the county where the undercover officer works." A. 7.

On August 22, 1994, the Second Circuit's mandate issued. On that same date, the State filed an untimely motion to stay the mandate; that motion was summarily denied. On October 3, 1994, pursuant to the Second Circuit's mandate, the district court entered its order granting the writ and allowed the State a reasonable time to retry the case.

REASONS WHY THE PETITION SHOULD BE DENIED

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY DETERMINED THAT, IN THE ABSENCE OF ANY EVIDENCE THAT THEY POSED A THREAT TO THE WITNESS, THE EXCLUSION OF PETER VIDAL'S PARENTS FROM THE COURTROOM DURING THE TESTIMONY OF A KEY WITNESS WAS A VIOLATION OF HIS RIGHT TO A PUBLIC TRIAL.

This case demonstrates nothing more than the well-settled principal that a defendant's right to a public trial must give way to other interests only in rare and compelling circumstances, and "the balance of interests must be struck with special care." Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215 (1984);[3] see also Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 509-10, 104 S. Ct. 819, 824 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 2620 (1982) ("the State's justification in denying access must be a weighty one"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81, 100 S. Ct. 2814, 2829-30 (1980) (opinion of Burger, C.J.). That this well-settled principal precluded closing the courtroom in this case is all the more apparent because, despite what the State refers to as "the breadth of the nation-wide drug problem," P. 5, not a single published decision from any other state has approved of completely closing the courtroom in such a routine street level drug sale case.

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3. In Waller, this Court held that the test established in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819 (1984), for determining when courtroom closure is appropriate for First Amendment purposes also applies in the Sixth Amendment context. 467 U.S. at 47, 104 S. Ct. at 2216.

The Second Circuit decided an even narrower issue -- whether the exclusion of Peter Vidal's family from the courtroom was proper. As the Second Circuit correctly concluded, where there is absolutely no evidence that Peter Vidal's parents posed any threat to the undercover officer, Mr. Vidal's right to have them present as he went to trial could not validly be overcome.

Contrary to the State's representation, the Second Circuit did not create a new "inclined to harm" rule for excluding members of the public from the court. See P. 6-7. The Second Circuit simply applied two basic principles. First, that the closure determination must be made on a case by case basis, after a careful evaluation of the circumstances, "for it is clear that the circumstances of the particular case may affect the significance of the interest" the State seeks to protect. Globe Newspaper Co., 456 U.S. at 607-08, 102 S. Ct. at 2620-21. Second, that this Court has long guarded with special solicitude an accused's right "to have his friends, relatives, and counsel present no matter with what offense he may be charged." In re Oliver, 333 U.S. 257, 272 (1948).

The circumstances of this particular case presented no justification for keeping Peter Vidal's parents out of the courtroom. Indeed, the very facts that the State relies on for the "implicit" threat to the officer's well-being, P. 7, underscore the weakness of their argument. The only known location where the officer worked was about three miles away from where Peter Vidal's parents lived. In a county covering 41 square miles with 1.2 million residents, see People v. Martinez, 82 N.Y.2d 436, 443, 604 N.Y.S.2d 932, 936 (1993), they were, in

effect, worlds apart. Only by combining the unlikely possibility of a subsequent chance encounter with the officer (while he was working undercover), with the baseless assumption that these "very decent individuals" would expose his identity to a drug dealer, does the State arrive at its "implicit threat." That the Second Circuit concluded that Peter Vidal's parents could not be excluded from the courtroom on the basis of speculation and conjecture is certainly no radical departure from established law.

The State is also incorrect in its assertion that "this Court has never decided whether Waller's 'overriding interest' requirement to justify the complete closure of a pre-trial proceeding should apply to closure of a limited portion of a trial." P. 8. More than ten years ago this Court held that a "compelling" or "overriding" interest must be demonstrated in order to exclude the public from even a portion of a criminal trial. See Globe Newspaper Co., 457 U.S. at 606-609 (portion of sex offense trial when minor victim testifies can be closed only on showing of "compelling governmental interest"); Press-Enterprise Co., 464 U.S. at 509-511, 104 S. Ct. at 824-25 (closing all but 3 days of 6 week voir dire improper where "overriding interest" was not demonstrated).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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